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No. 76-870

In the Supreme Court of the United States

OCTOBER TERM, 1976

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, PETITIONER

v.

SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The final opinion of the court of appeals *en banc* (Pet. App. A-224 to A-264) is reported at 541 F. 2d 1292. The opinion of the district court (Pet. App. A-123 to A-223) is reported at 401 F. Supp. 1276. An earlier opinion of the court of appeals *en banc* (Pet. App. A-97 to A-122) is reported at 498 F. 2d 1314 and the district court's opinion (Pet. App. A-14 to A-96) is reported at 358 F. Supp. 584.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on August 30, 1976. A timely petition for rehearing was denied on September 28, 1976. The petition for a writ of certiorari was filed on December 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Wilderness Act prohibits commercial logging in virgin timber areas within the Boundary Waters Canoe Area of the Superior National Forest.

2. Whether an environmental impact statement prepared by the Forest Service to accompany its ten-year management plan for the Boundary Waters Canoe Area satisfied the requirements of the National Environmental Policy Act with respect to the completion of existing timber sales.

STATEMENT

1. In November, 1972, petitioner instituted this action in the United States District Court for the District of Minnesota seeking to halt the cutting of timber in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest in the State of Minnesota.[1] After a hearing, the district court enjoined further cutting pending the completion of an environmental impact statement that the Forest Service was then in the process of preparing (Pet.

[1]The BWCA, containing 1,030,000 acres located in the Superior National Forest, was designated by the Forest Service as a canoe area. Subsequently, Congress included the BWCA as part of the Natural Wilderness Preservation System. Wilderness Act, 78 Stat. 890, 16 U.S.C. 1131 *et seq.* Heavy recreational use is made of its developed system of lakes and portages. The area has been divided into an Interior (or no cut) Zone and a Portal Zone where timber cutting has been permitted for many years. Recreation has historically been confined to the lakes and portages and developed road systems. Entry into the area of high recreational use is through the Portal Zone to the Interior Zone where 90 percent of the visitors to the BWCA come for the purposes of water recreation. The Shipstead-Nolan Act of 1930, 46 Stat. 1020, 16 U.S.C. 577 *et seq.*, provided that timber harvest shall not generally occur within 400 feet of the natural shorelines. In addition, the Forest Service has forbidden logging that is visible from any lake, stream or portage or within 400 feet of trails. To preserve the quality of the recreational experience, most logging occurs during the winter months, when recreational use is at its lowest.

App. A-14 to A-96). The court of appeals sitting *en banc* affirmed (Pet. App. A-97 to A-122).

2. Litigation was renewed after the Forest Service completed the impact statement on the ten-year management plan for the BWCA. After trial, the district court permanently enjoined timber harvesting, holding that the Wilderness Act prohibited all timber cutting in the virgin areas of the BWCA; that the impact statement was inadequate; and that the decision to allow timber cutting was arbitrary and capricious (Pet. App. A-123 to A-223).

3. By unanimous decision, the court of appeals sitting *en banc* reversed (Pet. App. A-224 to A-264). The court of appeals held that the Wilderness Act did not prohibit commercial logging in the virgin areas of the BWCA Portal Zone, and that "the [environmental impact statement] and Management Plan adequately describe the environmental impacts and alternatives with respect to the existing sales * * *" (Pet. App. A-251). Although dissolving the injunction with respect to existing timber sales, the court sustained the injunction with respect to future sales, pending completion by the Forest Service of its timber management plan for the Superior National Forest and accompanying impact statement (*id.* at A-252). The court denied a timely petition for rehearing.

ARGUMENT

1. Petitioner challenges (Pet. 17-27) the unanimous holding of the court of appeals *en banc* that Section 4(d)(5) of the Wilderness Act, 78 Stat. 895, 16 U.S.C. 1133 (d)(5), permits commercial logging within the Portal Zone of the Boundary Waters Canoe Area. Petitioners rely upon the general provisions of the Wilderness Act; however, the explicit statutory language of the provision that applies to the BWCA alone contemplates the continuation of timber cutting. Section 1133(d)(5) states: "Other provisions of this Act to the contrary notwithstanding, the management of the

Boundary Waters Canoe Area * * * shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area * * *." Moreover, as the court of appeals held, both the "administrative history of the BWCA and the legislative history of the Wilderness Act conclusively show that logging was to continue as a permissible use within the BWCA's Portal Zone under the Act" (Pet. App. A-231, A-256 to A-264).

Petitioner argues that this timber use is inconsistent with the general purposes of the Act and unwise as a management tool (Pet. 26-27). But Congress made its choice by enacting Section 1133(d)(5); a decision on any substantive policy change "must come from Congress or the responsible executive agency, not from the courts" (Pet. App. A-233). Cf. *Crooks* v. *Harrelson*, 282 U.S. 55, 60.[2] The decision of the court of appeals is correct, and there is no occasion for this Court to review the meaning of a unique statutory provision that applies to the BWCA alone.

2. Petitioner claims (Pet. 6-16) that the court of appeals incorrectly permitted logging on existing sales in the absence of an impact statement fully describing the environmental impact of any future sales. The existing sales were made during the period 1959-1969 (Pet. App. A-101 to A-102, n. 8), logging roads for those sales have been constructed, and logging has been partially completed (Pet. App. A-47 to A-57). The remaining timber to be logged constitutes approximately 5,500 acres or less than one percent of the BWCA virgin forest (Pet. App. A-227). The court of appeals held that the environmental impact

[2]A bill was recently introduced in Congress to withdraw the authority for timber harvesting in the Boundary Waters Canoe Area. 123 Cong. Rec. H624 (daily ed., January 31, 1977).

statement accompanying the BWCA ten-year management plan, together with the individual environmental analysis reports (EARs) on the individual sales, fully analyzed the environmental impact of completion of these existing sales. The court concluded (Pet. App. A-250 to A-251):

> We are convinced that the EIS and EARs were prepared by the Forest Service with good faith objectivity. They provide enough specific information to permit a reasoned choice of alternatives. They are, therefore, in compliance with the "detailed statement" requirement of NEPA.

The impact of future sales will, as the court of appeals stated, be detailed in the Timber Management Plan for the Superior National Forest and the accompanying environmental impact statement (Pet. App. A-252). The court continued the permanent injunction against future sales pending completion of those documents and appropriate review, but dissolved the injunction with respect to existing timber sales (Pet. App. A-254). Since logging under the existing sales in no way commits the Forest Service to the approval of future sales, the court of appeals' decision to permit continued logging on existing sales is fully consistent with this Court's statement in *Kleppe* v. *Sierra Club*, No. 75-552, decided June 28, 1976, slip op. 22, n. 26:

> Nor is it necessary that petitioners always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others * * *. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project

when preparing the comprehensive statement on the cumulative impact of remaining proposals.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Petitioner cites (Pet. 14) the *per curiam* opinion on rehearing in *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission*, Nos. 75-4276, 75-4278, September 8, 1976 (C.A. 2), petitions for certiorari pending, Nos. 76-653, 76-762, 76-769 and 76-774. As the United States and the Nuclear Regulatory Commission stated in their memorandum in response to those petitions, the *per curiam* opinion of the court of appeals in that case cannot be reconciled with *Kleppe* v. *Sierra Club, supra.* (We are furnishing counsel for petitioners here with a copy of that memorandum.) In any event, *Natural Resources Defense Council, Inc., supra,* is distinguishable because, unlike the instant case, there the court of appeals stated (incorrectly, we believe) that current activity would commit resources in such a way as to preordain choices regarding future actions (slip op. 5485).